No. 80-1354

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,

In The

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 241, AFL-CIO,
PETITIONER

-VS-

ASSOCIATION OF SCIENTISTS AND PROFESSIONAL ENGINERRING PERSONNEL

-AND-

RCA CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

When a work assignment dispute between a union and an employer has been submitted to bi-partite arbitration and the arbitrator has issued an award resolving the dispute, should a District Court vacate the arbitration award and order tri-partite arbitration at the request of a second union and the employer?

LIST OF PARTIES INVOLVED

Pursuant to the Rules of this Court the following were parties in the court whose judgment is sought to be reviewed:

International Federation of Professional and Technical Engineers, Local 241, AFL-CIO

Association of Scientists and Professional Engineering Personnel

RCA Corporation

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, as yet unreported, appears in the Appendix to this petition, infra. pp. 3a . The transcribed oral opinion of the United States District Court for the Eastern District of Pennsylvania, also unreported, appears at page 7a of the Appendix.

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was issued and entered on October 8, 1980. A timely Petition for Rehearing was denied on November 14, 1980. This Petition for Certiorari was filed less than 90 days from the date of denial. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. §185(a); Labor-Management Relations Act §301(a)

STATEMENT OF THE CASE

The Association of Scientists and Professional Engineering Personnel (hereinafter ASPEP) brought an action in the United States District Court for the Eastern District of Pennsylvania seeking to enjoin Petitioner International Federation of Professional and Technical Engineers, Local 241 (hereinafter "Local 241") and the RCA Corporation (hereinafter "RCA") from proceeding with an arbitration without the participation of ASPEP. The arbitration concerned the assignment of work to members of Local 241. ASPEP alleged an interest in the work in question. Federal jurisdiction was invoked under 29 U.S.C. §185 (§301 of the Labor-Management Relations Act). There being no material facts in dispute, Local 241 and ASPEP filed Cross Motions for Summary Judgment. The District Court granted ASPEP's motion and ordered ASPEP's unconditional participation in the arbitration. Local 241 then appealed to the United States Court of Appeals for the Third Circuit which affirmed the judgment be-

low.

Local 241 and RCA are parties to collective bargaining agreements covering RCA employees in Camden and Moorestown, New Jersey. Local 241 claims that RCA is violating the collective bargaining agreements by assigning non-bargaining unit employees (i.e., members of ASPEP) to do the work of the Technical Writer and Editor, a Local 241 job classification. Though there are separate agreements for the Camden and Moorestown facilities, the contracts are almost identical and, pursuant to both agreements, bargaining unit work cannot be assigned to non-bargaining unit employees. The job description of a Technical Writer and Editor is identical in the two contracts.

The dispute was originally submitted to arbitration in 1964. At the time, the particular alleged violations were taking place at the Camden plant. At the arbitration, an agreement was reached and adopted by Arbitrator Lawrence E. Seibel as an award. The award further classified the job description in question and awarded

certain work to Local 241.

Despite the award, disputes continued to arise concerning the allocation of work at the Moorestown plant. RCA claimed that the Seibel award was limited to Camden. Local 241 sought relief by attempting to enforce the Seibel award in Federal Court but the court ordered that the remaining differences between Local 241 and RCA be resolved through a new arbitration. Local 241 then submitted the Moorestown case to arbitration.

An arbitration hearing was held before the late Dr. S. Herbert Unterberger on March 31, 1978 at which hearing Local 241 and RCA agreed that the arbitrator should first decide the threshold issue of whether the 1964 Award of Arbitrator Seibel was applicable to the Moorestown plant. Testimony was taken, a full, fair hearing was conducted, briefs were submitted and, on May 25, 1978, Dr. Unterberger issued his decision.

Unterberger held that the Seibel award was applicable to Moorestown and another hearing was convened to determine the specific application of

the contract provision, as clarified by the Seibel Award, to the specific factual circumstances at Moorestown. This reconvened hearing was scheduled for February 16, 1979. Prior to that date, ASPEP, which also has a collective bargaining agreement with RCA, had neither participated nor attempted to participate in any of the afore described proceedings; nor had RCA objected to the bi-partite nature of the proceedings to that point.

ASPEP appeared for the first time at the February 16, 1979 hearing and sought to intervene, claiming the disputed work belonged to its members. At the hearing, Local 241 informed ASPEP that it would consent to its intervention if ASPEP agreed to be bound by the awards which had already been rendered. The awards were, in effect, the determinants of the submission to the arbitrator on February 16, 1979.

ASPEP, through its counsel, informed the arbitrator and the parties that it would not agree to be bound by the prior awards. In response, Local 241 requested that the arbitration be reconvened without ASPEP's participation. A hearing

date was set, but the instant suit was filed prior to the hearing and all parties agreed to postpone the arbitration pending the outcome of this action.

On February 14, 1980, Judge Louis H. Pollak of the United States District Court for the Eastern District of Pennsylvania ordered that ASPEP be allowed to intervene and that neither ASPEP nor Local 241 and RCA were to be bound by the terms of the Seibel and Unterberger awards. The Court of Appeals affirmed this judgment.

REASONS FOR GRANTING THIS WRIT

1. THE DECISION BELOW DECIDES AN IMPORTANT QUESTION RELATING TO THE DEVELOPING FEDERAL COMMON LAW OF LABOR RELATIONS, WHICH QUESTION HAS NOT BEEN DECIDED BY THIS COURT.

   A. THE DECISION BELOW HOLDS THAT A VALID BI-PARTITE ARBITRATION AWARD MAY BE VACATED IN ORDER TO ALLOW FOR TRI-PARTITE ARBITRATION, AN IMPORTANT ISSUE YET TO BE ADDRESSED BY THIS COURT.

The concept of tri-partite arbitration of labor disputes was initiated by this Court in Transportation-Communication Employees Union v. Union Pacific R.R. Co., 385 U.S. 157, 87 S.Ct. 369 (1966). In that case, it was held that, under the Railway Labor Act, the Railroad Adjustment Board must consider the claims and interests of all interested unions before resolving a work assignment dispute. The decision, however, was based on an analysis of the Railway Labor Act and did not address the applicability of tri-partite arbitration in the context of §301 of the

Labor-Management Relations Act (hereinafter LMRA).

Subsequent to the Transportation-Communications Employees Union decision, various circuit courts extended the use of tri-partite arbitration to cases seeking to compel tri-partite proceedings under §301 of the LMRA. The seminal case was CBS, Inc. v. American Recording and Broadcasting Association, 414 F.2d 1326 (2nd Cir. 1969). The Second Circuit held that, under §301 of the LMRA, the federal courts possessed the power to order tri-partite arbitration of a work assignment dispute despite the absence of a clause in any of the relevant collective bargaining agreements specifically permitting tri-partite arbitration.

The CBS decision acknowledges that the existence of the power to order tri-partite arbitration does not resolve "whether there was a proper exercise of that power", 414 F.2d at 1329, but the opinion is virtually silent as to the factors which should be considered in making that final determination.

This Court has held that bi-partite arbi-

tration of a work assignment or jurisdictional dispute is a valid and available forum under contracts governed by §301 of the LMRA. Carey v. Westinghouse Electric Corporation, 375 U.S. 261, 84 S.Ct. 401 (1964). The Carey holding, therefore, at least implies that this Court would not apply the Transportation-Communications Employees decision to a §301 action without qualification and modification. The Transportation-Communication Employees case holds that the Railroad Adjustment Board (i.e. arbitrator) must consider and decide the claims of all interested unions in one proceeding if work assignments are at issue. Under the Railway Labor Act, the resolution of the "entire dispute" is not an option but a mandate. Carey explicitly permits bipartite arbitration, even though aspects of the dispute may remain unresolved and duplicative proceedings may result. (See concurring opinion of Justice Harlan, 375 U.S. at 273, 84 S.Ct. at 409).

Petitioner does not contend that tri-partite arbitration cannot be compelled under the LMRA,

even though this Court has yet to decide that question. The general validity of the CBS decision has been accepted by those circuits which have addressed the issue and Petitioner does not wish to challenge this judicial trend.[1]

Petitioner does suggest, however, that tri-partite arbitration should not have been compelled in the instant case and that this court should address the question of when such an order is appropriate under §301 of the LMRA. In particular, this Court should determine whether and when the desirability of tri-partite arbitration

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1. The Third Circuit explicitly acknowledges the power to order tri-partite arbitration in the instant case and, as dictum, in Winslow Glass Cutters League v. American St. Gobain Corp., 428 F.2d 353 (3rd Cir. 1970). The Ninth Circuit accepts the concept in Louisiana-Pacific Corp. v. Int'l Brotherhood of Electrical Workers Local 2294, 600 F.2d 219 (9th Cir. 1979). The Seventh Circuit compelled tri-partite resolution in Local 416, Sheet Metal Workers Int'l Assoc. v. Helgesteel Corp., 507 F.2d 1053 (7th Cir. 1974). A District Court within the Fourth Circuit followed CBS in Baltimore Typographical Union No. 12 v. A.S. Abell Co., 441 F.S. 596 (D.Md. 1977). The Tenth Circuit refers to CBS with approval in Sheet Metal Workers Int'l Assoc., Local Union 49 v. Los Alamos Constructors, Inc., 550 F.2d 1258 (10th Cir. 1977).

permits the vacating of a valid award entered under a bi-partite proceeding, as permitted in Carey.

The issue is of major significance, for if a bi-partite award concerning a work assignment can be vacated by a subsequent request for tri-partite arbitration, the Carey decision is, in effect, turned into a nullity and an unprecedented erosion of the national labor policy favoring the finality of arbitration will have been created.

Carey will become a nullity because the employer could escape any unfavorable bi-partite award by subsequently demanding a tri-partite hearing. As the union involved in the bi-partite proceeding will invariably be the union which has not been assigned the work (the union performing the work would not file a grievance), the grieving union will have no incentive for utilizing arbitration. It cannot win through a bi-partite proceeding. It can only lose.

The union would, therefore, have to seek tri-partite arbitration itself, an unappealing op-

tion, as the second union, which is already doing the work, would not want to risk its position through arbitration and the employer would have little interest in giving up its two bites at the apple, having already decided to give the work to the second union. (The unpleasant reality of this scenario is evident in the instant case, where neither the employer nor the second union made any effort to invoke a tri-partite procedure until after the petitioner obtained an arbitration ruling in its favor).

The grieving union's other option is to go on strike, so as to bring the matter before the NLRB. This is exactly the situation Carey wished to avoid. 375 U.S. at 272.

The national policy favoring the finality of an arbitrator's award will also be eroded. The concepts set forth in the Steelworker Trilogy have been the foundation of American labor relations for a generation. By creating a new basis for vacating an arbitrator's award, that basis being the employer's dissatisfaction with the result and the interests of a third party, the Third

Circuit has, in two paragraphs, tampered with a basic principle which has effectively promoted industrial peace in this country. As has been outlined above, the consequences of this change may not be salutary.

Petitioner submits that an issue of this consequence should be considered and decided by this Court.

2. THE DECISION OF THE THIRD CIRCUIT CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

The question of whether a bi-partite award should be vacated in the interests of tri-partite arbitration has been addressed by four other courts of appeals. Two of the decisions conflict directly with the Third Circuit's holding in this case.

In Louisiana-Pacific Corp. v. International Brotherhood of Electrical Workers, Local Union 2294, 600 F.2d 219 (9th Cir. 1979), the Ninth Circuit addressed a situation in which two unions claiming the same work proceeded with bi-partite arbitrations against the same employer. Both of the unions were successful and the company was obligated to pay "two different sets of employees for the work of one." 600 F.2d at 220. The company sought to set aside the awards and obtain tri-partite arbitration. The Ninth Circuit held that the policies favoring the finality of arbitration awards predominate over the policies favoring tri-partite arbitration and refused to

compel tri-partite arbitration at the expense of vacating valid bi-partite awards.

The Third Circuit asserts below that Louisiana-Pacific "does not compel a contrary result" to that reached below. Petitioner respectfully disagrees. The Third Circuit's decision below effectively vacates a valid bi-partite award and is in direct conflict with the Ninth Circuit.

In Local 771 I.A.T.S.E. v. RKO General, Inc., 546 F.2d. 1107 (2nd Cir. 1977), the Second Circuit refused to vacate a bi-partite award against a union in a work assignment case, despite the union's contention that the work assignment dispute was multilateral in nature. The Second Circuit ruled that the Union could not collaterally attack the arbitrator's award since it had freely chosen the bi-partite forum.

In the instant case, the employer never challenged the bi-partite proceeding until after the award was issued. The petitioner submits that the Third Circuit's willingness to vacate the award, despite the Employer's failure to object to bi-partite arbitration before the award was en-

tered, is in direct conflict with the Second Circuit's holding.

In Sheet Metal Workers International Assoc., Local Union No. 49 v. Los Alamos Constructors, Inc., 550 F.2d 1258 (10th Cir. 1977), the Tenth Circuit compelled tri-partite arbitration despite the existence of a bi-partite award. This case involved the distinguishing issue of whether the parties' contract actually required multilateral resolution of the dispute in question. The court held that it did.

The Tenth Circuit also rejected the union's claim that the employer had waived its right to a multilateral arbitration.

Finally, in Local 416, Sheet Metal Workers Int'l Association v. Helgesteel Corp., 507 F.2d 1053 (7th Cir. 1974), the Seventh Circuit vacated a bi-partite award issued by a Local Joint Adjustment Board and compelled multilateral resolution through a National Joint Board. As in Los Alamos, supra, the decision rested upon the conclusion that the parties' contract required the

use of the multilateral forum to resolve jurisdictional disputes.

Respectfully submitted,

MERANZE, KATZ, SPEAR & WILDERMAN
Attorneys for Petitioner

By _____
BERNARD N. KATZ

Of Counsel:

IRA SILVERSTEIN

Dated: February 10, 1981

Appendix

APPENDIX A

ORDER OF HONORABLE LOUIS H. POLLAK, J. - FILED FEBRUARY 14, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ASSOCIATION OF SCIENTISTS AND PROFESSIONAL ENGINEERING PERSONNEL	:	
V.	:	CIVIL ACTION
INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 241 AFL-CIO	:	
and	:	
RCA CORPORATION	:	NO. 79-2222

O R D E R

For the reasons set forth in my opinion from the bench on February 13, 1980:

The motion of Association of Scientists and Professional Engineering Personnel for summary judgment is GRANTED.

The motion of International Federation of Professional and Technical Engineers, Local 241 AFL-CIO for summary judgment is DENIED.

The parties are ordered to continue arbitration case number 14 30 1516 77 M/J as a tri-

partite proceeding. The Association of Scientists and Professional Engineering Personnel is to be afforded the opportunity to present evidence and argument, as may be appropriate, with respect to all relevant issues, including those embraced by the 1964 Seibel award and the Unterberger interim award of May 25, 1978. Those awards shall be given such precedential weight in resolving the issues in dispute as the arbitrator deems proper.

14 February 1980 s/LHP
Louis H. Pollak

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1379

ASSOCIATION OF SCIENTISTS AND PROFESSIONAL ENGINEERING PERSONNEL

vs.

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 241, AFL-CIO and RCA CORPORATION

International Federation of Professional and Technical Engineers, Local 241, AFL-CIO,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 79-2222)

Argued
October 7, 1980
Before: SEITZ, Chief Judge, and ALDISERT
and VAN DUSEN, Circuit Judges

JUDGMENT ORDER

After considering all the contentions raised by appellant, to-wit, that the district court erred in ordering tripartite arbitration without being

bound by a preliminary award of an arbitrator, and after considering the stated national labor policy providing "for the prompt and orderly settlement of all disputes," and considering this court's traditional policy encouraging arbitration, and after considering Transportation-Communication Employees Union v. Union Pacific Railroad Co., 385 U.S. 157 (1966); Window Glass Cutters League v. American St. Gobain Corp., 428 F.2d 353 (3d Cir. 1970); CBS Inc. v. American Recording & Broadcasting Ass'n, 414 F.2d 1326 (2d Cir. 1969); and having decided that Louisiana-Pacific Corp. v. IBEW Local 2294, 600 F.2d 219 (9th Cir. 1979), does not compel a contrary result, it is

ORDERED AND ADJUDGED that the judgment of the district court be and is hereby affirmed. Further, it appearing that the relief requested in the counter-claim of RCA was identical to that requested by the plaintiff, we are of the view that the district court's order constituted a final order under 28 USC §1291.

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Costs taxed against appellant.

BY THE COURT,

Seitz

Chief Judge

Attest:

s/SM

Sally Mrvos, Clerk

DATED: Oct. 8, 1980

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1379

ASSOCIATION OF SCIENTISTS AND PROFESSIONAL ENGINEERING PERSONNEL

v.

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 241 AFL-CIO and RCA CORPORATION

International Federation of Professional and Technical Engineers, Local 241, AFL-CIO,

Appellant

PRESENT: SEITZ, Chief Judge, VAN DUSEN and ALDISERT, Circuit Judges.

ORDER

ORDERED that appellant's petition for rehearing before the original panel is hereby denied.

By the Court,

Seitz
Chief Judge

DATED: November 14, 1980

APPENDIX D

TRANSCRIPT OF ARGUMENT OF FEBRUARY 13, 1980 - FILED MARCH 12, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ASPEP,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
LOCAL 241 and RCA,	:	
Defendants.	:	NO. 79-2222

Philadelphia, Pennsylvania
February 13, 1980

BEFORE THE HONORABLE LOUIS H. POLLAK, J.

APPEARANCES:

ANTHONY DeSABATO, ESQ.,
For the Plaintiff

IRA M. SILVERSTEIN, ESQ.,
For Local 241.

JOHN H. LEDDY, ESQ.,
for RCA.

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THE COURT: I have found the arguments presented on behalf of each of the parties very helpful, indeed, and I am grateful to you. I had hoped before the argument that I would be so fully instructed that possibly I would be in a position to resolve the matter this afternoon but that didn't seem to be highly probable, considering the state of my ignorance and the substantiality of the issues, but for better or for worse, your arguments have been of a quality that they have at least led me to think that I did understand the problems that we have been talking about or at least brought me to a level of understanding which was not likely to be enhanced by further study, so that I am now in a position of feeling impertinent enough to go ahead and decide the matter. Of course, I will quickly disabuse some of you of the assumption which is the predicate of my resolving this from the bench, mainly that I do understand the matter. But I will do my best.

This case takes its origins from a dispute

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as to appropriate work assignments for certain highly technical workers in RCA in the Moorestown facility. The dispute, really, is whether certain work should be done by persons who are members of Local 241 of the International Federation of Professional and Technical Engineers or should be done by persons who are members of the Association of Scientists and Professional Engineering Personnel, the former union to be hereinafter referred to as Local 241 and the latter union to be referred to hereinafter as ASPEP.

The questions of appropriate work assignment had arisen in what at least in Local 241's view was a very closely comparable context in RCA's Camden facility many years ago and an arbitral award in an arbitration proceeding to which Local 241 and RCA were parties arising out of a collective bargaining agreement between RCA and Local 241 was determined by Arbitrator Sidell, according to a construction of that collective bargaining agreement. The question of work assignment in Camden arises, in the perception

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of Local 241, under its collective bargaining agreement governing the question of work assignment in Moorestown arises under the collective bargaining agreement between Local 241 and RCA as it governs the Moorestown facility, in Local 241's view.

In ASPEP's view, it arises under ASPEP's collective bargaining agreement with RCA governing the Moorestown facility.

An arbitration commenced I'm not sure exactly when -- perhaps in 1977, certainly by 1978 -- with a view to determining whether Local 241 was right in its claim that the Moorestown jobs in question should be assigned to it, to its personnel, its members, rather than, as in RCA's view, to outside Bargaining Unit personnel which would have meant ASPEP personnel.

Reached an interim determination in May of 1978 that, as Local 241 contended and contrary to the view taken by RCA, the so-called Sidell award construing the Camden collective bargaining agreement should, as it were, be the rule of

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law governing the very closely comparable language and so it is felt to be closely comparable problem of work allocation arising in Moorestown.

That interim determination was made by the then arbitrator, Dr. S. Herbert Unterberger, in his interim award of arbitrator dated May 25, 1978, in an arbitration proceeding in which, of course, the parties and the only parties were Local 241 and RCA.

It was then understood that the next stage of that arbitration would be to found the particular facts of the Moorestown problem within the rubric of the Sidell construction which Dr. Unterberger had adopted as the law of the case.

Matters were in that posture when, in February of 1979 at a resumed hearing of the Local 241/RCA Moorestown arbitration aspect presented itself when ASPEP asked leave to intervene, asserting its interest under its Moorestown collective bargaining agreement in protecting work assignments felt by ASPEP to be proper. Local 241 informed ASPEP that in Local 241's perspective, ASPEP would be welcome as an intervenor, pro-

vided that ASPEP accepted the prior determinations as binding. The prior determinations referred to were the original Sidell award and the interim award by Dr. Unterberger of May 25, 1978, incorporating the Sidell award into the arbitral law, as it were, of the Moorestown facility under the Local 241/RCA collective bargaining agreement.

After considering the matter for a few days ASPEP, through counsel, advised the arbitrator, Dr. Unterberger, and the parties to that arbitration, Local 241 and RCA, that it would not acquiesce in an intervention which would be under ground rules that would foreclose reexamination by the arbitrator of issues which had been determined at an earlier stage when, by definition, ASPEP had no opportunity to participate.

ASPEP then initiated this lawsuit seeking federal judicial intervention to require those parties to the arbitration and the arbitrator to permit ASPEP to intervene without limit; that is to say, without the constraints that would have

been imposed by an acceptance of the interim award of Dr. Unterberger and the Sidell award on which it relied as binding on ASPEP.

Local 241, one of the two defendants, resists ASPEP's application unless it is conditioned on substantially the ground rules which Local 241 insisted on its own initiative in February of 1979, that is to say, intervention by ASPEP limited by the prior arbitral determinations.

RCA has counterclaimed and crossclaimed. It joins in seeking an order from this Court compelling tripartite arbitration but RCA is, I was about to say, equivocal but I think the proper term is Mr. Leddy's term, neutral, with respect to whether the arbitrator should be instructed that the prior rulings Dr. Unterberger, who is now deceased, therefore would be succeeded by another arbitrator, is more remotely, Arbitrator Sidell, are to be opened for reexamination, are to be taken as binding or may be regarded as binding or open for reconsideration in the arbitrator's own independent judgment.

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The first question, so it seems to me, is whether I have jurisdiction in this lawsuit. None of the parties has really asserted that I do not have jurisdiction but I suppose that it should be taken as inviting me not to easy acquiescence but, rather, into a posture of searching skepticism that Justice Brandeis was right in asserting the first duty of courts is to do nothing. The claim of jurisdiction, if jurisdiction there be, rests on Section 301 of the Taft-Hartley Act, that is to say, ASPEP is here in the posture of asserting rights under its collective bargaining agreement with RCA as that collective bargaining agreement relates to the Moorestown facility. I think ASPEP acknowledges that it is not alleging a violation of that collective bargaining agreement as that terms is normally understood.

One might say on the face of it without alleging a violation of the collective bargaining agreement a plaintiff is in difficulty invoking Section 301 of Taft-Hartley. I think that the cases touching on this general problem make it pretty

clear that one situated as ASPEP is, one can bring a lawsuit of this sort on the basis of Section 301.

In effect, what ASPEP is doing is asserting a strong interest in protecting what it deems to be its proper contractual rights under Section 301 and the allegation is that the arbitration which is in process has a strong likelihood of producing an award which would infringe on what ASPEP believes to be its own contractual domain and, therefore, it is seeking equitable relief against RCA and Local 241 to protect against a destruction of its contractual rights.

I guess I should say parenthetically at this point that it is a position which in some sense assumes that an award, arbitral award, favorable to Local 241 would preclude an arbitral award in another proceeding favorable to ASPEP; yet I think it's common ground, at least it is now, common ground in the colloquy between Mr. DeSabato and me and it wasn't exactly controverted by any other lawyer who argued this

afternoon that conceptually it would be entirely possible for two arbitrations to go forward and result in two awards which imposed on a single employer, in this instance RCA, inconsistent obligations to the extent that those are inconsistent obligations, simply for the payment of money and presumably the employer would be in the position, though not happily, of responding to both awards.

To the extent that the awards directed the employer in different courses of action for the future with respect to the assignment of work, then very likely it certainly would be RCA's position there would have to be some device for reconciling those two inconsistent obligations, but for the moment the only point I'm making is that so long as ASPEP were not party to an arbitration which involved Local 241 and RCA, ASPEP would not, under ordinary notions of res adjudicata, be bound by any award that emerged.

I ventured into the parenthesis really by way of suggesting that one could take issue with

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ASPEP's assertion of a cause of action to prevent Local 241 and RCA from doing damage to ASPEP's asserted contractual rights under its own collective bargaining agreement but at this stage of the case it seems to me sufficient to say that ASPEP can make what in the real world is at least understandable, perhaps reasonably persuasive case that it may well be prejudiced in the subsequent protection of what it regards as its work assignment domain by an award, albeit an arbitral proceeding to which it is not a party which is assigned to another union, in this instance Local 241, the very positions that Moorestown ASPEP believes it has a stake in.

So I conclude that there is a jurisdictional base, a federal question claim assertable under Section 301 of Taft-Hartley for ASPEP's lawsuit and I emphasize that finding of jurisdiction and the cause of action to go with it in the case as initiated by ASPEP because in that sense I take issue with Mr. DeSabato's concession/assertion that ASPEP's standing in this courtroom is

strengthened, confirmed, possibly even dependent on the subsequently asserted position of RCA on the crossclaim-counterclaim calling for the relief which ASPEP has asked for in the first instance subject, of course, to the qualification that I noted before that RCA does not ask for any ground rules to be laid down as to the way the arbitration should be, tripartite arbitration should be conducted.

In what I have said I do not mean to attribute to Mr. DeSabato a legal position different from which, after all, he should be entitled to characterize. I was simply trying my best to describe a brief colloquy which we had.

In short, I think the jurisdiction and the cause of action asserted by ASPEP is closely enough analogous to the jurisdiction and cause of action recognized by the Court of Appeals for the Second Circuit in the CBS case where, to be sure, the initiating plaintiff was the corporation which feared that it would be pressed by two competing and potentially, allegedly potentially

inconsistent arbitral awards and the Second Circuit sustained the tripartite arbitration approach.

I also think that the Third Circuit's line of approach to this general range of problem as indicated in the Windowglass Cutters League case, 428 F.2d 353, which I was unfamiliar with until Mr. Leddy brought it to my attention, is, at a minimum, very strong authority for the entitlement both as to jurisdiction and cause of action of a union bringing a proceeding of this kind.

Now, having established in my view that there is authority in this Court to entertain the lawsuit at ASPEP's behest and this without regard to whether RCA took a position consistent with or antagonistic to ASPEP's view, I will turn to whether the relief ASPEP has requested is proper.

My broad judgment is that the line of cases commencing with the Supreme Court's decision in the Transportation, Communication Employees Union versus Union Pacific, 385 U.S. 157 is strongly indicative of a national labor poli-

cy which should encourage tripartite arbitration in situations of this kind. By "of this kind" I mean situations most especially characterized by jurisdictional disputes. Work assignments in which an employer finds himself beleaguered -- I don't mean this in a disparaging sense. That's the social functions which unions are to perform -- beleaguered by the competing claims of two or even more unions with which an employer has collective bargaining relationships. So I think the philosophy expressed by the Supreme Court was properly recognized by the Second Circuit in the CBS case and ought to be followed here in this Circuit and Judge Van Dusen's opinion in the Windowglass Cutters case is certainly indicative of such an attitude on the Court of Appeals.

I think Judge Teitelbaum's opinion, albeit in a somewhat different context, in a fairly recent volume of Fed. Sup. -- I may not have it -- United States Steel Workers of America versus Crane, 456 U.S. 385, is consistent with that approach.

APPENDIX D

The position of Local 241, in essence, is this: That there must be a point after which an arbitral proceeding once commenced should not be derailed by changing its character and making it tripartite. Indeed, Local 241 argues with considerable strength from the language of the Ninth Circuit's opinion in -- let me see if I do have it.

(Pause)

It's the Louisiana Pacific case in 600 F.2d 219 that this application comes far too late; if tripartite arbitration is to be pursued, it should be pursued before any bipartite arbitral proceeding has commenced.

I don't read the Second Circuit as having intended such a limitation in the CBS case, though that is as probably -- a proper description of the scenario of the CBS situation and if the Ninth Circuit meant to say that the commencement, let alone the termination, which was the fact in the Ninth Circuit, commencement of an arbitral proceeding in the bipartite phases pre-

cludes shifting its format to a tripartite one then, with all respect, I would have to differ with the Ninth Circuit.

The real question, it would seem to me, is essentially a fairly practical one of whether the -- well, let me go back. The view taken by the Ninth Circuit seems to suggest that by the time awards have been entered, they have the kind of sanctity of vestedness that prevents their being qualified by the addition of some further phase which would attempt to reconcile them.

That view, in turn, I think assumes that a tripartite arbitral proceeding has to wind up choosing sides as between the primacy of one union's claim and the total subordination of the other. I don't think that there is anything intrinsic in the momentum of the arbitral process that requires such an assumption of that uniformly has to be the result. It may very commonly be the result but the very notion of a tripartite proceeding certainly, as I think articulated by the Supreme Court, is one in which the

arbitrator is bound to consider both claims, both sets of collective bargaining relationships, the agreements relied on and the contextual history and perhaps, indeed, reach a result which a result which accommodates those varieties of interest in a way which in some instances would put more of a burden on an employer than an employer would reasonably expect to get, losing either one bipartite arbitral proceeding or another bipartite arbitral proceeding; that is to say, I don't think there is any assurance that a tripartite arbitral proceeding is, from an employer's point of view, a security blanket against liability greater than that which would be imposed under either one or the other collective bargaining agreement. But all of that is entirely speculative and I say it only by way of explaining what I perceive to be the set of expectations underlying the Ninth Circuit's approach to the question.

If we assume that there comes a point in a bipartite arbitral proceeding at which it has

matured so far that there is a quality of vestedness about what has happened which is cognate with one's entitlement to rely on the results of a judicial proceeding which has gotten to judgment, if we assume that, and I think that is an assumption that needs to be taken with considerable qualification, given all the differences between arbitration and adjudication, most notably the fact that arbitration is a process of dispute resolution which is in some substantial measure personal to the particular parties which invoke it as the very great difficulty of intervening in this very arbitral proceeding gives strong witness, but if we assume that there comes a point of vestedness in the arbitral process, I cannot see in the bipartite arbitration that has been going forward since 1977 or 1978 between Local 241 and RCA with respect to the Moorestown job that any such stage of vestedness has been arrived at.

I fully understand Local 241's interest in protecting as "law of the case or law of the

arbitration" the interim Unterberger award of May 25, 1978, but, important as that determination was, all it was was an announcement to the parties these are the legal ground rules on which I now anticipate I will rely in examining the facts of the particular jobs which are in dispute.

To say to ASPEP, "Yes, we will have a tripartite arbitration but it will be subject to the binding rule of Dr. Unterberger's May 25, 1978 interim award," is to give ASPEP nothing if the Unterberger interim award is as comprehensive a disposition of the central issues, at least as between Local 241 and RCA, as it has been assumed to be in the course of today's argument and the solidity of that assumption I think is the strength with which Local 241 insisted and ASPEP resisted the proposition that intervention by ASPEP should be conditional on acceptance of what had been determined before.

In a sense, I found the most telling claim made by Local 241 for maintaining the integrity of the Unterberger interim award the proposition

that had Dr. Unterberger gone the other way so that, in effect, Local 241 would have lost a substantial legal basis for its claim as to how the Morrestown jobs should be allocated, I think it would be hard to imagine Local 241 being able to come into this Court and say: All right. Having substantially lost that bipartite arbitration, we now want to convene a tripartite arbitration with Dr. Unterberger's award discarded or at least relegated to non-binding status.

I think the Local 241 argument is valid so far as it goes but it does not go far enough I think for two reasons: One, again, is that whatever victory Local 241 registered as against RCA in the Unterberger interim award, it, by definition, was not a victory as against ASPEP because ASPEP was not a party to that bipartite arbitration.

The other ground of limitation for that substantial argument by Local 241 is that Local 241 elected a bipartite arbitral process, namely, the process contemplated by its collective bar-

gaining agreement, and presumably it could have chosen to complete itself, that is to say, to ask for the invocation of a tripartite arbitral proceeding.

Local 241 has argued strenuously that RCA has been laggard in coming on strong in joining ASPEP's hue and cry for a tripartite arbitral proceeding. Local 241, in effect, would paint RCA into the corner which the Ninth Circuit placed that unhappy company in that Louisiana case.

Well, if we merely look at the chronology, I think it's clear that RCA has not come and asked for tripartite arbitration after two awards were outstanding against it. There isn't as yet even one award, though there may be thought to be something close to one in Local 241's perception of the matter. So I don't think we have anything comparable with the Ninth Circuit decision yet.

I have already indicated that I have some problem about accepting the Ninth Circuit's view of the very case which it decided but nothing be-

fore me calls on me to have the impertinence to reject the wisdom of the Ninth Circuit. I am a little dubitante about that case on its own facts and those facts certainly are not these facts here.

In any event, as I see the case before me, it is one in which this Court's aid has been properly invoked by ASPEP as the initial plaintiff without regard to RCA's position.

The fact that RCA has chosen to counterclaim and crossclaim as it has does not seem to me to add weight to the jurisdiction that is already mine. In some sense, RCA's position adds to the equitable strength of ASPEP's claim but the disposition I am going to make of this case does not turn on RCA's position one way or another.

My conclusion is that ASPEP's motion for summary judgment will be granted. I will direct that the defendants, Local 241 and RCA, proceed with ASPEP to continue the arbitration which is in progress but on a tripartite basis.

Moreover, I will direct that the arbitration

from here forward be conducted by the arbitrator on the premise that Dr. Unterberger's interim award of May 25, 1978, is open to reexamination, that is to say, is not binding on ASPEP or, indeed, on either of the other parties to the tripartite arbitration.

It may be said that in some sense RCA derives a windfall unknown to res adjudicata but itself now being out from under the binding effect of the interim award by Dr. Unterberger but it seems to me very difficult to contemplate proceeding with an arbitration in which there would be law of the case for one party but not for the other two parties.

Now, in directing that Dr. Unterberger's May 25, 1978 interim award, the Sidell award on which it depends, not be treated as law of the case for the balance of this arbitration I do not mean for a moment to suggest that the arbitrator cannot look to Unterberger and Sidell for guidance. They retain such precedential value as the arbitrator may properly wish to assign to

them. They are simply not to be treated as outside the realm of further controversy.

In short, ASPEP is to come into this arbitration free to raise such issues as appropriately in the arbitrator's view go to a proper resolution of the apparently competing claims of two unions, each of which has a collective bargaining agreement with the employer, RCA.

Needless to say, the freedom which ASPEP has pursued those issues carries with it the cognate freedom of RCA and of Local 241 to pursue with the arbitrator's guidance all those issues.

It is my intention to enter a very brief written order in which I will try to say in a couple of sentences what you have been so patiently listening to for approximately an hour now.

(Whereupon court is adjourned)

APPENDIX D

C E R T I F I C A T E

I, Michael Feuer, C.S.R., Official Court Reporter in and for the United States District Court, Eastern District of Pennsylvania, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes taken in the matter of ASPEP versus Local 241 and RCA, on February 13, 1980.

MICHAEL FEUER, C.S.R.
Official Court Reporter

No. 80-1354

Office-Supreme Court, U
FILED
MAR 13 1981
CLERK, SUPREME COURT, TEXAS.

In The

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 241, AFL-CIO,
PETITIONER

-VS-

ASSOCIATION OF SCIENTISTS AND PROFESSIONAL ENGINERRING PERSONNEL

-AND-

RCA CORPORATION

BRIEF OF ASSOCIATION OF SCIENTISTS AND PROFESSIONAL ENGINEERING PERSONNEL IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision below ordering tripartite arbitration of a work assignment dispute among one employer and two competing unions should be affirmed in accordance with the clear policy in favor of tripartite arbitration, especially where no prior final arbitral award would be affected.

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JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was issued and entered on October 8, 1980. A timely Petition for Rehearing was denied on November 14, 1980. This Petition for Certiorari was filed less than 90 days from the date of denial. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. §.85(a); Labor-Management Relations Act §301(a).

STATEMENT OF THE CASE

In this case, International Federation of Professional and Technical Engineers, Local 241, AFL-CIO (hereinafter "Local 241") seeks reversal and the Association of Scientists and Professional Engineering Personnel (hereinafter "ASPEP") seeks affirmation of the final order of The Honorable Louis N. Pollak rendered on February 13, 1980 in Civil Action No. 79-222 in which Judge Pollak ordered Local 241, appellee RCA, and ASPEP to proceed to tripartite arbitration in a work assignment dispute.

The relationship among the parties and the facts involved herein are as follows. ASPEP and RCA have entered into a collective bargaining agreement effective July 6, 1977 to July 1, 1980, which contains a recognition clause providing that ASPEP is the sole and exclusive bargaining agent for all engineers as defined in the agreement. Local 241 and

RCA have likewise entered into an agreement, effective June 15, 1977 to June 15, 1981. Local 241 claims that some of the aforementioned engineering work should be assigned to Local 241 members rather than to ASPEP members and filed a grievance to that effect with RCA Corporation. RCA processed that grievance through the arbitration procedure and a hearing was scheduled for September 20, 1978 before Arbitrator Dr. S. Herbert Unterberger, now deceased. The hearing was rescheduled for February 16, 1979. ASPEP, with counsel, appeared at the scheduled arbitration hearing on February 16, 1979 and attempted to intervene, asserting a vital interest in the outcome of the arbitration because the work in question therein had been assigned to ASPEP that ASPEP could not intervene unless it agreed to four ground rules: (1) ASPEP would be bound by a prior award rendered in 1964 by Arbitrator Seibel involving RCA and Local 241 at a location not in-

vo ved in this dispute; (2) ASPEP would be bound by Dr. Unterberger's preliminary or interim award; (3) ASPEP agreed that the dispute was being arbitrated under the Local 241-RCA agreement; and (4) ASPEP would be bound by Dr. Unterberger's final award. ASPEP was and is willing to agree that the final resolution of the dispute would be binding upon it, Local 241, and RCA, provided all parites have a full and fair opportunity to participate in the proceedings but was and is unwi-ling to agree to the first three ground rules. Local 241 would not permit tripartite arbitration unless ASPEP agreed to all four requirements. Thus, ASPEP filed suit in Federal District Court for the Eastern District of Pennsylvania against RCA and Local 241 requesting that bipartite proceedings be enjoined and that unconditional but binding tripartite arbitration be ordered. Thereafter, RCA

counterclaimed and crossclaimed for tripartite arbitration. Subsequently, the parties agreed to postpone any arbitral proceedings pending judicial determination of the issue.

In this context, the parties filed cross-summary judgment motions, argued the case before Judge Pollak, and were ordered by Judge Pollak to proceed to unconditional, binding, tripartite arbitration.

Local 241 appealed to the United States Court of Appeals for the Third Circuit. On October 8, 1980, the Third Circuit affirmed the court below based upon the national labor policy providing for the prompt and orderly settlement of all disputes and the court's traditional policy encouraging arbitration, citing, Transportation Communication Employees Union v. Union Pacific Railroad Co., 385 U.S. 157 (1966); Window Glass Cutters League v. American St. Gobain Corp., 428 F.2d 353 (3rd Cir. 1970); CBS, Inc. v. American Recording & Broadcasting Ass'n., 414 F.2d 1326 (2nd Cir. 1969).

REASONS FOR NOT GRANTING A WRIT OF CERTIORARI

A. The Decision Below Does Not Decide any Novel or Important Question Relating to the Federal Common Law of Labor Relations Which Has Not Been Decided by This Court.

The Decision below merely applies this Court's Decision in Transportation-Communications Employees Union v. Union Pacific R.R. Co., 385 U.S. 157 (1966) to a case brought pursuant to Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. §185(a). In Transportation-Communications Employees, this Court decided that the federal policy in favor of peaceful settlement of labor disputes required that a work assignment dispute arising under the Railway Labor Act be resolved in one tripartite proceeding in which the employer and the two work claimants were to participate. The very same federal labor policy favoring the prompt, expeditious, peaceful resolution of labor disputes applies with at least equal force to cases arising

under Section 301 of the Labor-Management Relations Act. Indeed, every Circuit Court of Appeals which has addressed this issue has so decided. CBS, Inc. v. American Recording and Broadcasting Associates, 414 F.2d 1326 (2nd Cir. 1969); Window Glass Cutters League v. American St. Gobain Corp., 428 F.2d 353 (3rd Cir. 1970); Local 416 Sheet Metal Workers Int'l. Assoc. v. Helgesteel Corp., 507 F.2d (7th Cir. 1974); Louisiana-Pacific Corp. v. Int'l. Brotherhood of Electrical Workers Int'l. Assoc., Local Union 49 v. Los Alamos Constructors, Inc., 550 F.2d 1258 (10th Cir. 1977).

This Court should not divert its attention from more pressing issues merely to articulate the obvious applicability and availability of tripartite arbitration in a §301 suit.

B. The Third Circuit Decision Herein Does Not Conflict with Any Decisions of Other Federal Courts of Appeal.

The Federal District Court for the Eastern District of Pennsylvania held that a 1964 arbitration settlement by Local 241 and RCA approved by Arbitrator Lawrence E. Seibel involving an RCA facility other than the one in which the instant dispute has arisen and that a 1978 interim award by the late Arbitrator Dr. S. Herbert Unterberger had not yet reached a "stage of vestedness" which is "cognate with one's entitlement to rely on the results . . ." (Appendix D to Local 241's Petition for A Writ of Certiorari at 24a). In short, Judge Pollak decided that the prior awards factually were not sufficiently final to impede him from ordering tripartite arbitration. This conclusion is both reasonable and efficacious in light of the fact that the 1978 decision was so interim in nature that Local 241 required additional proceedings as a result of that decision.

Implied in the Third Circuit's affirmation of Judge Pollak is the Circuit's belief that substantial evidence supported Judge Pollak's finding that the previous proceedings lacked finality.

This key factual distinction differentiates the instant case from Louisiana-Pacific Corp. v. International Brotherhood of Electrical Workers, Local Union 2294, 600 F.2d 219 (9th Cir. 1979) and Local 771 I.A.T.S.E. v. RKO General, Inc., 456 F.2d 1107 (2nd Cir. 1977) where final and binding bipartite arbitration awards were held by the Ninth and Second Circuit Courts of Appeal to prevent the issuance of an order to arbitrate the disputes in a tripartite proceeding. Thus, there is no conflict between or among

any Circuit Courts of Appeal to move this Court to review the instant case.

Respectfully submitted,

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Dated: March 12, 1981

No. 80-1354

MAR 20 1981

ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1980

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 241, AFL-CIO,
Petitioner,

v.

ASSOCIATION OF SCIENTISTS AND PROFESSIONAL ENGINEERING PERSONNEL and RCA CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT RCA CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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F. Elkouri & E. A. Elkouri, How Arbitration Works (3d ed. 1973) 9

COUNTER STATEMENT OF QUESTION PRESENTED

Does a District Court have discretion to order tripartite arbitration of a work assignment dispute between two unions following an arbitration hearing involving one of the unions and the employer which resulted in the issuance of a preliminary award?

COUNTER STATEMENT OF THE CASE

This case was commenced when the Association of Scientists and Professional Engineering Personnel ("ASPEP") sought an order in the District Court for the Eastern District of Pennsylvania requiring the International Federation of Professional and Technical Engineers, Local 241 ("Local 241") and RCA Corporation ("RCA")[1]

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1. Pursuant to Supreme Court Rule 28.1 RCA Corporation states that, with the exceptions set forth below, all of its subsidiaries, both domestic and foreign, are wholly owned. Each subsidiary that is not wholly owned is set forth below, followed by a designation of its jurisdiction and the composition of its ownership. Companies appearing in the ownership column that are marked with an asterisk are wholly owned subsidiaries of RCA Corporation.

Subsidiary	*Jurisdiction*	*Ownership*
Hertz Italiana S.p.A.	Italy	(75%) Hertz Int'l*
		(25%) FIAT S.p.A.
Fly & Drive Center Co., Ltd.	Japan	(50%) Hertz System, Inc.*
		(50%) Nippon Rent-A-Car Services, Inc.
United Truck Leasing, Inc. (United)	Minnesota	(99.7%) Hertz*
		(.3%) Minority holders
Lawrence Motors, Inc.	Minnesota	(100%) United
Red Wing Transportation Corporation	Minnesota	(100%) United
Red Wing Truck Rental, Inc.	Minnesota	(100%) United
RCA Solid State Ltda.	Brazil	(51%) RCA Electronica Ltda.*
		(49%) Philco Radio e Television Ltda.

to engage in a tri-partite arbitration proceeding with ASPEP to resolve a jurisdictional dispute between the two

1. (Cont'd.)

Subsidiary	*Jurisdiction*	*Ownership*
RVC Corporation	Japan	(50%) Bermuda*
		(50%) Victor Company of Japan, Ltd.
Edizioni Musicali Acqua Azzurra S.r.l.	Italy	(51%) RCA Musica S.p.A.*
		(49%) Individuals
RCA S.A.	Spain	(94.14%) IDC*
		(3.88%) Urech Group
		(1.98%) Others
Ediciones Musicales RCA Espanola, S.A.	Spain	(100%) RCA S.A. (Spain)
Ediciones Musicales Universal, S.A.	Spain	(100%) Ediciones Musicales RCA Espanola, S.A.
Ediciones Musicales Brincos, S.A.	Spain	(100%) Ediciones Musicales Universal, S.A.
RCA, S.A. de C.V.	Mexico	(75%) IDC*
		(25%) DESC (Mexican Group)
Editorial Mexicana de Musica, S.A. de C.V.	Mexico	(100%) RCA, S.A. de C.V.

unions as to certain technical work assignments at RCA's Moorestown, New Jersey facility.

The work assignments in dispute come within the provisions of RCA's respective collective bargaining agreements with ASPEP and with Local 241. Over 15 years ago, a similar work assignment question arose in RCA's Camden, New Jersey, facility and the dispute between RCA and Local 241 was settled by an arbitration award issued by Arbitrator Laurence E. Siebel in 1964 ("Camden Award"). Arbitration proceedings concerning the Moorestown dispute between Local 241 and RCA began 14 years later, in 1978, before the late Arbitrator S. Herbert Unterberger ("Unterberger"). RCA had assigned certain jobs to ASPEP members, and Local 241 claimed that those jobs should have been assigned to its members.

At a hearing held on March 13, 1978, Local 241 and RCA agreed that Unterberger should decide the preliminary issue of whether the 1964 Camden Award applied at the Moorestown facility. In accordance with that agreement, Unterberger issued an Interim Award of Arbitrator ("Interim Award") dated May 25, 1978 in which he determined with respect to this preliminary issue that, since the provisions concerning job assignments involved in the Camden contract were identical to the provisions in the Moorestown contract, the interpretation of the contract language contained in the Camden award did apply to Moorestown. In that Interim Award, Unterberger explicitly provided that the "extent of the application of those provisions so interpreted to situations in the Moorestown plant with different sets of facts will depend on those sets of facts." (Appendix at 1a). Unterberger stated in his opinion:

> "That [1964 Camden] Award then applied that interpretation to the facts of the case presented in [the

> Camden Grievance]. Insofar as the grievances involved in this case have an identical set of facts, that Award would also apply to them. This would also appear to be the situation for those that involved closely similar sets of facts. To the extent that the facts differ significantly from those in [the Camden Grievance], the Award would have to be based on the application of that interpretation to the specific set of facts." (Appendix at 9a).

Accordingly, a second hearing was scheduled for February 16, 1979 for the express purpose of determining to what extent the Camden Award did apply to the facts at Moorestown.

ASPEP sought leave to intervene in the second hearing, seeking to protect its members' interests in the work assignments involved. Local 241 stated that it had no objection to ASPEP's intervention, provided ASPEP accepted the 1964 Award and the Interim Award as binding on the rights of its members irrespective of the fact that the application of these awards to the particular facts at Moorestown was yet to be determined. ASPEP declined to accept this condition and initiated suit in district court seeking tri-partite arbitration. RCA filed a counterclaim and cross-claim also seeking tri-partite arbitration. ASPEP and Local 241 filed cross-motions for summary judgment. Local 241 sought an order that ASPEP would be bound by the preliminary Interim Award. District Judge Louis H. Pollak denied Local 241's motion, and granted ASPEP's motion, ordering that the arbitration continue as a tri-partite proceeding.

The Court of Appeals for the Third Circuit affirmed that decision. Local 241 filed a petition for rehearing in the Third Circuit, which petition was denied. Local 241 seeks certiorari.

SUMMARY OF ARGUMENT

Local 241 has not advanced any legitimate basis for this Court to grant certiorari. The decision of the Court of Appeals for the Third Circuit does not raise any new or important question concerning federal labor law. That decision endorses the well-accepted policy favoring tripartite arbitration as the most desirable method for resolving work assignment disputes arising under the Labor-Management Relations Act.

Because the case at bar does not involve a final, enforceable bi-partite arbitration award, the decision below does not affect the national labor policy in favor of according deference to final arbitration awards and does not conflict with any decision of any other court of appeals in which the court has deferred to such a final award.

The contentions raised by Local 241 were carefully considered and rejected by the courts below and do not warrant further review.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Vacate a Final Bi-Partite Arbitration Award in Order to Allow for Tri-Partite Arbitration.

Local 241 argues that the decisions of the district court and the court of appeals vacated a valid award entered under a bi-partite proceeding in favor of tri-partite arbitration and that this result has two undesirable effects on the federal common law of labor relations. Local 241 argues first that the decisions effectively nullify a previous decision of this Court holding that bi-partite arbitration is a valid forum for the resolution of work assignment disputes under contracts governed by § 301 of the Labor-Management Relations Act of 1947. It further argues that the lower court decisions erode the national labor policy favoring the finality of arbitration. The decisions of the lower courts have neither effect.

With respect to the first alleged effect, it is clear that the lower court decisions pose no threat to this Court's statement in **Carey v. Westinghouse Electric Corp.**, 375 U. S. 261 (1964), that bi-partite arbitration is an available method for resolving work assignment disputes. In **Carey**, this Court held that such arbitration is not barred by the National Labor Relations Board's authority regarding questions of union representation. **Carey** in no way was limited to approving only bi-partite arbitration, and cannot be read as a blanket endorsement of that method as the only or even the best method for resolving such disputes. To the contrary, as Local 241 concedes, decisions rendered subsequent to **Carey** reflect a clear trend among federal courts which strongly favors tri-partite arbitration as the best and most practical method for the resolution of work assignment disputes. (See cases cited at footnote 2 of the Petition).

In arriving at its conclusion, the Third Circuit relied on several of the post-Carey decisions encouraging tri-partite arbitration. Chief Judge Seitz, writing for the court, cited **Transportation-Communication Employees Union v. Union Pacific Railroad Co.**, 385 U. S. 157 (1966), in which this Court held that the Railroad Adjustment Board was obligated to settle a work assignment dispute between two unions in a single proceeding. The Court of Appeals further relied on **Columbia Broadcasting System, Inc. v. American Recording and Broadcasting Ass'n**, 414 F. 2d 1326 (2d Cir. 1969), *aff'g*, 293 F. Supp. 1400 (S. D. N. Y. 1968), in which the court, applying the principle enunciated in **Transportation-Communication**, affirmed the lower court's order that a work assignment dispute arising under the Labor-Management Relations Act should be resolved through tri-partite arbitration. Finally, the court followed its own decision in **Window Glass Cutters League of America v. American St. Gobain Corp.**, 428 F. 2d 353 (3d Cir. 1970), in which it required joinder of a second union in a Labor-Management Relations Act suit involving a dispute over work assignments.

These cases recognize that the rational, meaningful and peaceful resolution of work assignment disputes and the avoidance of potentially conflicting results require that all parties to such disputes appear before the same tribunal. In the instant case, the Third Circuit carefully weighed these considerations in conjunction with the stated national labor policy favoring the prompt and orderly settlement of all disputes and the court's traditional policy encouraging arbitration, and correctly concluded that the litigants should commence tri-partite arbitration without being bound by a preliminary award (Appendix B to Petition at 3a-4a).

It is significant that Local 241 does not challenge the validity or the growing strength of the judicial encouragement of tri-partite arbitration, but only contends that tri-

partite arbitration is not appropriate under *this* particular set of facts (Petition at 12). Accordingly, it is clear that the Court of Appeals decision raises no important issue having any possible consequence requiring this Court's attention, but raises only an issue limited to the facts to which it is addressed. Local 241's assertion that the Court of Appeals decision "nullifies" **Carey**, which permitted bi-partite arbitration but by no means precluded tri-partite arbitration, is simply erroneous.

The second "important" impact of the opinion below asserted by Local 241—that the decision erodes the national policy favoring finality of arbitration—is equally without merit. Local 241 continues to ignore, as it did below, the critical fact that an interim award is not a final award. Accordingly, the policy favoring finality of arbitration is totally unaffected by the decisions below.

The Interim Award decided only the preliminary issue that, since the contract provisions of the Moorestown plant collective bargaining agreement were virtually identical to those of the Camden plant agreement, the earlier interpretation of the provisions of the Camden agreement in the Camden Award was applicable to the Moorestown agreement. It is highly significant that the use of an "Interim Award" is commonplace when an arbitration proceeding is divisible into two (or more) phases; the "Interim Award" is used to dispose of a preliminary phase or phases and a "Supplemental Award" or "Final Award" is issued to dispose ultimately of the entire matter. F. Elkouri and E. A. Elkouri, *How Arbitration Works*, 214-15 (3d ed. 1973). This was precisely the situation presented to the courts below. Unterberger's Interim Award disposed of only the first phase of the arbitration proceeding —the applicability of the contract interpretation in the 1964 Camden Award to the Moorestown dispute. The final award, which would resolve the entire matter and apply that contract interpretation to the specific facts at

Moorestown, awaited a further hearing. Judge Pollak correctly stated the factual posture of the case:

> "[I]f we assume that there comes a point of vestedness in the arbitral process, I cannot see in the bipartite arbitration that has been going forward since 1977 or 1978 between Local 241 and RCA with respect to the Moorestown job that any such stage of vestedness has been arrived at.
>
> "I fully undestand Local 241's interest in protecting as 'law of the case or law of the arbitration' the interim Unterberger award of May 25, 1978, but, *important as that determination was, all it was was an announcement to the parties these are the legal ground rules on which I now anticipate I will rely in examining the facts of the particular jobs which are in dispute.*" (Appendix D to Petition at 24a-25a) (emphasis added).

Local 241's argument that the decision ordering the arbitration to continue as a tri-partite proceeding "vacated" the Interim Award not only obscures the correct facts; it misconceives the principles of federal common law governing finality of arbitration decisions.

Many arbitration awards are not sufficiently final to have a binding effect and the Interim Award in this case is one of them. In order to be final and binding, an award must resolve the entire claim that has been submitted, so that no further litigation is necessary to determine the obligations of the parties, *e. g.*, **La Vale Plaza, Inc. v. R. S. Noonan, Inc.**, 378 F. 2d 569 (3d Cir. 1967); **Puerto Rico Maritime Shipping Authority v. Star Lines Ltd.**, 454 F. Supp. 368, 372 (S. D. N. Y. 1978); or it must determine a separable issue that can stand alone and is not dependent upon resolution of the remainder of the award to have effect, such as a determination of liability which is independent of a claim for punitive damages or attorney's

fees. **Refino v. Feuer Transportation, Inc.**, 480 F. Supp. 562, 567 (S. D. N. Y. 1979). To be enforceable as a final resolution of a dispute, an award "must be certain, final and complete and leave no doubt as to the manner in which it is to be made effective." **Electrical Contractors Ass'n v. IBEW, Local 103**, 327 F. Supp. 1177, 1181 (D. Mass. 1971), *aff'd*, 458 F. 2d 590 (1st Cir. 1972).

The preliminary award in the instant case resolved only part of the job assignment issue. Without application to the facts of the case as they related to the Moorestown plant, the contract interpretation contained in the Interim Award was meaningless.

It is patently apparent that, contrary to the impression which Local 241 attempts to create, the true reason it urges review is its fear that it may not obtain the work assignments that RCA has made to ASPEP members in a proceeding in which the rights of *all* interested parties would be considered. To ask this Court, in effect, to guarantee a successful outcome for Local 241 in that proceeding by binding the parties to a 16-year old contract interpretation does not provide a valid basis for granting certiorari. See Supreme Court Rule 17.

The decisions below do not raise an important issue of federal labor law. They turned upon the unique facts of this case and will affect no one other than the three litigants who will continue in tri-partite arbitration. The courts below fully considered and correctly decided the issues presented and certiorari should not be granted.

II. The Decision of the Third Circuit Does Not Conflict With Any Decision of Any Other Court of Appeals.

Contrary to Local 241's assertions, the decision of the Court of Appeals for the Third Circuit in this case does not conflict with any other circuit court decision. Local 241 contends that the instant decision conflicts with

Louisiana-Pacific Corp. v. IBEW, Local 2294, 600 F. 2d 219 (9th Cir. 1979), wherein the court denied an employer's suit to compel tri-partite arbitration after two inconsistent *final* bi-partite awards had been rendered in two different proceedings. Judge Pollak held, and the Third Circuit agreed, that this decision did not preclude tri-partite arbitration in the case at bar because of a critical factual distinction. In **Louisiana-Pacific,** the court declined to set aside the two inconsistent arbitral awards because they had been rendered as final awards *before* the employer sought tri-partite arbitration. Unlike that case, the interim arbitral award involved in the case at bar was not final; it decided only a preliminary issue in an arbitration proceeding that was still in progress. Finally, unlike the employer in **Louisiana-Pacific,** RCA in its cross-claim and counterclaim sought tri-partite arbitration before it was confronted with two conflicting awards.

For the same reason, the decision below does not conflict with the Second Circuit's decision in **Local 771, I. A. T. S. E. v. RKO General, Inc.,** 546 F. 2d 1107 (2d Cir. 1977), which also involved a final arbitration award.

Local 241's persistent refusal to contend with the critical distinguishing fact that no final enforceable award exists in the case at bar is a poorly disguised attempt to manufacture a valid basis for securing certiorari. While a direct and irreconcilable conflict may provide a legitimate basis for review, *see, e.g.,* **Avco Corp. v. Aero Lodge No. 735,** 390 U.S. 557, 559 (1968); **Northeastern Pennsylvania Nat'l Bank & Trust Co. v. United States,** 387 U. S. 213, 217 (1967), an illusory conflict such as that asserted by Local 241 does not.[2]

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2. Clearly, the Third Circuit opinion is not in conflict with **Sheet Metal Workers, Local No. 49 v. Los Alamos Constructors, Inc.,** 550 F. 2d 1258 (10th Cir. 1977), in which the court compelled tri-

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated March 20, 1981

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2. (Cont'd.)
partite arbitration after a bi-partite award had been entered, or **Local 416, Sheet Metal Workers Int'l Ass'n v. Helgesteel Corp.**, 507 F. 2d 1053 (7th Cir. 1974), where the court ordered multilateral arbitration after two inconsistent bi-partite awards had been entered.

Appendix.

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between
INTERNATIONAL FEDERATION of PROFESSIONAL and TECHNICAL ENGINEERS, LOCAL 241
and
RADIO CORPORATION of AMERICA

Case Number: 14 30 1516 77 M/J

INTERIM AWARD OF ARBITRATOR

The undersigned arbitrator, having been designated in accordance with the arbitration agreement entered by the above-named Parties, and dated June 7, 1974 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

1. The interpretation contained in the December 10, 1964 Award in American Arbitration Association Case No. L-34324, PHI-L-244-62 of the provisions of the Camden plant Agreement that are identical to the provisions in the Moorestown plant Agreement is found to be equally applicable in the Moorestown plant.

2. The application of those provisions so interpreted in that Award is found to be equally applicable to situations in the Moorestown plant with the same or closely similar set of facts as in Grievance No. 30645

involved in that case. The extent of the application of those provisions so interpreted to situations in the Moorestown plant with different sets of facts will depend on those sets of facts.

S. HERBERT UNTERBERGER

Arbitrator's signature (dated)
S. Herbert Unterberger
Arbitrator

May 25, 1978

OPINION

The preliminary issue in this case, which is decided by this Interim Award, is whether the December 10, 1964 Award in American Arbitration Association Case No. L-34324, PHI-L-244-62, which was agreed to by the parties as the basis for the settlement of Grievance No. 30645 that arose in the Company's Camden, N. J. plant, is applicable in its Moorestown, N. J. plant.

The essential facts are:

1. By a supplemental agreement dated May 14, 1957, the parties agreed to the following revised occupational definition of the Technical Writer and Editor classification:

> "Compiles, writes and edits a wide variety of technical material such as instructional leaflets, manuals, books, operation folders or installation and maintenance directions related to products manufactured by RCA and participates as required in preparation of reports and proposals of a technical nature.
>
> Analyzes preliminary production schedules and confers with appropriate supervision to determine needs and plans work to meet schedules. Confers with design and development engineers and others to obtain necessary information preparatory to making rough drafts of material. Prepares text and plans details of material by reviewing drawings, technical publications, miscellaneous engineering data, and customer's specifications. Plans format of material in accordance with application and requirements and directs the preparation of sketches, drawings, photographs, or schematic diagrams to be included with text. Obtains necessary approvals of completed text and collaborates with illustrators to plan cover and page layouts, including illustrations and photographs. Initiates requests as required for type proofs and repro-

duction proofs including text and finished illustrative material. Verifies proofs and completed material prepared by printing vendors for accuracy, quality and general appearance. Participates as required in writing technical articles for engineering societies, management and other publications. Directs the efforts of Technical Writers, reviews and edits their material and recommends appropriate alterations or corrections when necessary."

In that agreement, this classification was referred to as No. 5967 at the Camden plant and No. 5969 at the Moorestown plant. Those occupational definitions have been included in the subsequent labor agreements, including the one in effect in 1964 when the Award was issued and the 1974-1978 agreement under which this case arose.

2. Although separate Camden and Moorestown agreements are published, they are negotiated together with the same Local Union, include the same General Agreement and almost identical Supplementary Agreements. Attachment 1 of each of them includes descriptions of the occupations at each of those locations. Both include the Technical Writer and Editor classification described identically as quoted above. It continues to be referred to as No. 5967 in the Camden agreement and No. 5969 in the Moorestown agreement.

3. In February 1961, the following Grievance No. 30645 was submitted on behalf of the employees in this classification at the Camden plant:

"The Union contends that the following facts constitute a valid grievance and must be corrected immediately:

The Company is violating paragraph 17.07 of the general agreement in the preparation (writing and

editing) of reports and proposals of a technical nature.

The Union demands that the Company correct this condition immediately."

Paragraph 17.07 states:

"WORK ASSIGNMENTS: Employees who are excluded from the jurisdiction of the bargaining unit shall not be assigned to nor perform work of a nature normally performed by employees included in the bargaining unit."

4. On December 10, 1964, the arbitrator in the case involving that grievance issued the following Opinion and Award:

"This matter was submitted to arbitration under the rules of the American Arbitration Association in accordance with the provisions of the Collective Bargaining Agreement between the parties. The parties appeared before me and during the course of the hearing agreed at my request to consider the posssibilities of arriving at an amicable solution to the grievance.

After discussion and after consultation with me, the parties agree that the grievance is settled upon the following basis.

Writing which is part of the research and design engineering team effort and which is performed by Research, Design and Development engineers is not the work of Occupation 5967. When the product of the engineering team effort is to be used for a report or proposal to a customer, it will be sent to the person or activity in charge of coordinating such report or proposal, and any subsequent writing, rewriting, editing and compiling will be the work of Occupation 5967.

Writing which is performed in connection with customer reports and proposals in such activities as marketing, facilities, manpower, etc. is not the work of Occupation 5967. However, when the output of such activities is to be used for a report or a proposal to a customer, it will be sent to the person or activity in charge of coordinating such report or proposal, and any subsequent writing, rewriting, editing and compiling will be the work of Occupation 5967.

It is understood that any writing, rewriting, editing and compiling required after the report or proposal is released to the printer is not the work of Occupation 5967, but that the Company may require, at its discretion, employees of Occupation 5967 to perform duties at the printer's premises. It is further understood that the reports on which Occupation 5967 will work are those reports which are now being sent to the person or activity in charge of coordinating such reports.

After careful consideration, I am of the opinion that the amicable agreement reached between the parties is a reasonable one and the settlement reached is adopted as my Award in this matter."

5. Thereafter, discussions were held between the parties about the application of this Award in the Moorestown, N. J. plant but no agreement was reached. In November 1965, the following Grievance No. 95380 was submitted on behalf of the employees in this classification at that plant:

"The Company has violated the General and Supplementary Agreement and the directives of Arbitration Case No. L-34324 PHI-L-244-62 by assigning personnel not included in Occupation 5969 to perform the duties of writing, rewriting, editing, and

compiling reports and proposals being submitted to the customer.

The Union demands that these practices be stopped immediately and all report and proposal work be assigned to occupation 5969 as directed by Arbitration Case No. L-34324 PHI-L-244-62."

6. Although the following Company response to that grievance:

"No specific instances are known but the company agrees to assign one man of its choice to the reports and proposal section on a full-time basis."

was put into effect, it failed to satisfy the Union. It discussed the matter further with the Company and then entered suit in the U. S. District Court in an effort to enforce the arbitration Award at the Moorestown plant. When that suit was dismissed on the basis that it sought relief based on matters exclusively subject to the arbitration process, the issue was referred to this arbitration. A hearing was held on March 13, 1978. Post-hearing briefs were submitted by both parties.

Union Position

It was the Union's position that the 1964 arbitration Award necessarily controlled similar situations in the Moorestown plant. To do otherwise would, in its view, by contrary to the following provision in Paragraph 7.08 of the Master Agreement:

". . . Such arbitration shall be under the voluntary labor arbitration rules then obtaining of the American Arbitration Association. . . . The Parties agree that the decision or award of such Arbitrator shall be final and binding on each of the Parties and that they will

> abide thereby subject to such laws, governmental rules and regulations as may be applicable. In no event shall the same question or issue be the subject of arbitration more than once."

which barred the rearbitration of previously-decided issues.

It maintained that the Company had not denied that the issue in dispute at the Moorestown plant is the same as the one decided in the 1964 Award. Its witness testified that, during some ten years of discussion between 1964 and 1974, the Company had not denied that the Award was also applicable at the Moorestown plant. Those discussions related to the method of its application. That uncontradicted testimony stated that the Company did not take the position that that Award did not control Moorestown until the second step meeting held in 1974 on the grievance involved in this case.

In addition, the Union argued that, by its action in the above-quoted Grievance No. 95380, it acknowledged that the 1964 Award was applicable in the Moorestown plant.

Company Position

It was the Company's position that the 1964 Award is not applicable at the Moorestown plant because:

1. It is in fact a settlement by the parties of a particular grievance that involved only Occupation No. 5967 which is found only at the Camden and not at the Moorestown plant.

2. In the Company's view, the Camden and Moorestown plants are separate and distinct as evidenced by their separate labor agreements and separate bargaining units.

The Company denied that the absence of any specific statement by it that the 1964 Award did not apply to the

Moorestown plant implied its agreement that it did so, particularly in view of its actions which, in its view, were always contrary to that position.

Basis of the Award

The 1964 arbitration Award constituted not only that arbitrator's interpretation and application of the provisions of the agreement relevant to the issue involved in that case but, because it incorporated the agreement of the parties, it constituted also the parties' interpretation and application of those provisions and reflected their intentions regarding their meaning.

Those provisions are not only identical in both agreements but were negotiated together by the same negotiating teams. It must be concluded that they reflected the same intentions. From this, it follows logically that insofar as the 1964 arbitration Award interpreted those provisions in one of the agreements, that interpretation would be the same and, therefore, equally applicable to the identical provisions in the other contract. Furthermore, as a practical matter, there would not appear to be any way to avoid this.

That Award then applied that interpretation to the facts of the case presented in Grievance No. 30645. Insofar as the grievances involved in this case have an identical set of facts, that Award would also apply to them. This would also appear to be the situation for those that involved closely similar sets of facts. To the extent that the facts differ significantly from those in Grievance No. 30645, the Award would have to be based on the application of that interpretation to the specific set of facts.

The conclusion in this case is that:

1. The interpretation contained in the 1964 Award of the provisions of the Camden plant agreement that are

identical to the provisions in the Moorestown plant agreement is found to be equally applicable in the Moorestown plant.

2. The application of those provisions so interpreted in the 1964 Award is found to be equally applicable to situations with the same or closely similar sets of facts in the Moorestown plant. The extent of the application of those provisions so interpreted to situations with different sets of facts will depend on those sets of facts.